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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

[Entitlement to

FILE: B-200796

DATE: February 19, 1981

MATTER OF: Conrad A. Gerard - Retroactive Discontinued
Service Retirement]

DIGEST:

Retirement may be retroactively effected where agency determined that employee's demotion and transfer did not constitute an involuntary separation so as to entitle him to discontinued service retirement, but was later overruled by OPM. Agency may retroactively change employee's records to show that he retired January 27, 1980, because it failed to submit question of involuntary separation to OPM for advance decision as required by FPM Supp 831-1, par. S11-2.a. This failure constituted administrative error which justifies retroactive relief.

The Federal Aviation Administration (FAA) requests our decision on whether one of its employees may be retroactively granted discontinued service retirement. We hold that the employee is entitled to be retired as of January 27, 1980, because of the agency's failure to timely submit the matter to the Office of Personnel Management (OPM).

Mr. T.N. Burtness, Chief, Personnel Management Division, FAA Eastern Region, states that the employee, Mr. Conrad A. Gerard, was demoted effective January 27, 1980, from GS-12 to GS-11 and simultaneously reassigned from Charleston, West Virginia, to Huntington, West Virginia. Mr. Gerard had been promoted to the position of Electronic Technician, GS-12, effective February 26, 1978. However, as a condition of retaining that position it was necessary for Mr. Gerard to successfully complete a specific training course at the FAA Academy within 12 months of his promotion. Although Mr. Gerard was enrolled twice in the necessary course, he was withdrawn on both occasions. Therefore, the

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demotion was required. The new GS-11 position was located in Huntington, West Virginia, 68 miles from his previous station.

Upon notification of his demotion and transfer, and before its effective date, Mr. Gerard informed his supervisor that he wished to apply for discontinued service retirement. Subsequently, he did report for duty at Huntington on January 28, 1980. On February 1, 1980, Mr. Gerard appealed the FAA's preliminary determination that he was not eligible for discontinued service retirement to the Merit Systems Protection Board. On May 16, 1980, the Board dismissed the appeal for lack of jurisdiction.

On April 30, 1980, Mr. Gerard was advised by his agency that the fact that he reported for duty at Huntington made him ineligible for involuntary discontinued service retirement. On May 27, 1980, Mr. Gerard appealed his agency's decision to OPM. On July 3, 1980, OPM replied by letter that he had, in fact, met the requirements for a discontinued service retirement. Regardless of the reason for his downgrading, OPM reasoned that he was transferred outside the commuting area, and, thus, he was involuntarily separated. However, since OPM does not have authority to make retirements retroactive, Mr. Gerard was advised that he should, through agency channels, request the Comptroller General to rule on his case. If the Comptroller General authorized a retroactive separation, OPM stated that it would treat Mr. Gerard as having retired on January 27, 1980, and having served as a reemployed annuitant thereafter.

For the purposes of this decision we assume that Mr. Gerard meets all the statutory and regulatory conditions to be eligible for the discontinued service retirement. Thus, the only issue we will address is whether FAA may retroactively amend their records to show that Mr. Gerard retired on January 27, 1980.

Discontinued service retirement is authorized by 5 U.S.C. § 8336(d), which provides in pertinent part:

"An employee who is separated from the service--

"(1) involuntarily, except by removal for cause on charges of misconduct or delinquency

* * * * *

after completing 25 years of service or after becoming 50 years of age and completing 20 years of service is entitled to an annuity."

Federal Personnel Manual Supplement (FPM Supp.) 831-1, par., S11-2a. defines "involuntary separation" as including abolishment of position. That paragraph also states:

"The responsibility for determining whether a separation is involuntary for retirement purposes rests with the Commission [now OPM]. When an employee's decision between accepting another job offer or separation depends on whether the separation would be classed as involuntary for retirement purposes and doubt exists whether the proposed separation would be involuntary, the question should be referred to the Commission for advance decision, together with a statement of all the facts concerning the proposed action."

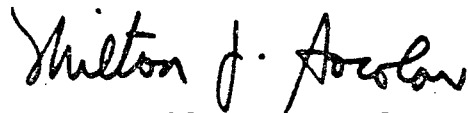
The FAA did not submit Mr. Gerard's case to OPM as is required by the above regulation. This had the effect of depriving him of his option to elect discontinued service retirement by leaving him in an untenable position: he could decline the new position and hope OPM eventually ruled in his favor, but, if OPM's ruling was adverse, he would have the status of a separated employee who was not yet eligible for retirement. His only viable choice was to accept the new position.

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This Office has previously permitted the retro-active changing of the retirement date of an employee where, as in the case before us, the agency failed to submit the question to OPM where doubt existed concerning whether a separation was involuntary. Dale Ziegler and Joseph Rebo, B-199774, November 12, 1980. In that decision we stated as follows:

"We believe that the intent of the FPM was to preserve the employees' option to elect the discontinued service retirement prior to the effective date of the proposed separations. But for the administrative error of DLA in not submitting the matter to OPM for an advance decision as required by FPM Supp. 831-1, par. S11-2.a, their right to elect discontinued service retirements would have been preserved. The record establishes that if the employees had been afforded this option, they would have elected the discontinued service retirements and their retirements would have been effected."

Accordingly, Mr. Gerard is entitled to be separated retroactively as of January 27, 1980, in order to receive discontinued service retirement.



For the Comptroller General
of the United States